Supreme Court, U.S.
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No.

In the Supreme Court of the United States

BEVERLY ENTERPRISES-ILLINOIS, INC.,
D/B/A VIP MANOR, PETITIONER

v.

VIRGINIA MITCHELL, EXECUTOR OF THE ESTATE OF
CHARLES A. MITCHELL

ON PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS,
FIFTH DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 2 of the Federal Arbitration Act (FAA) provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Illinois Nursing Home Care Act (INHCA) renders "null and void" any "waiver by a resident [of a nursing facility] or his legal representative of the right to commence an action" to enforce INHCA and any "waiver of the right to a trial by jury" executed prior to the commencement of any such action. 210 Ill. Comp. Stat. 45/3-606, 3-607.

The court below held that § 2 of the FAA does not preempt INHCA's anti-waiver provisions because "neither section [of the INHCA] specifically targeted arbitration agreements but rather prohibited any agreement which resulted in the deprivation of a nursing home resident's right to either commence an action under the Act or seek a jury trial in that action, and this court further held that the public policy expressed constituted a legitimate state law contract defense" (App., *infra*, 4a). The questions presented are:

1. Whether a state statute precluding the enforcement of arbitration agreements related to a single category of disputes may supersede Congress's declared policy requiring enforcement of arbitration agreements.

2. Whether a state statute must specifically target arbitration agreements in order to be preempted by § 2 of the FAA or whether it is

sufficient if the state statute as applied precludes any and all arbitration of disputes between private parties.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner Beverly Enterprises-Illinois, Inc., doing business as VIP Manor, is a California Corporation in good standing, wholly owned by Beverly Health and Rehabilitation Services, Inc., which is not a publicly held company. No publicly held company owns a ten percent or greater ownership interest in petitioner.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Beverly Enterprises-Illinois, Inc., doing business as VIP Manor, respectfully submits this petition for a writ of certiorari to review the judgment of the Appellate Court of Illinois, Fifth District in this case.

OPINIONS BELOW

The opinions below include the Order of the Circuit Court for the Third Judicial Circuit, Madison County, Illinois, dated October 24, 2007, denying Petitioner's motion to compel arbitration (App., *infra*, 1a); the Summary Order of the Appellate Court of Illinois, Fifth District, dated December 22, 2008, affirming the trial court's order (App., *infra*, 3a); the

Order of the Appellate Court of Illinois, Fifth District, dated January 28, 2009, denying Petitioner's motion for rehearing (App., *infra*, 6a); and the Order of the Supreme Court of Illinois, dated September 30, 2009, denying Petitioner's petition for leave to appeal (App., *infra*, 7a). Each of these decisions is unreported.

JURISDICTION

The judgment of the Appellate Court of Illinois was entered on December 22, 2008 (App., *infra*, 3a). The Supreme Court of Illinois denied Petitioner's petition for leave to appeal on September 30, 2009 (App., *infra*, 7a). The jurisdiction of this Court is proper pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2 of the United States Constitution (the Supremacy Clause) provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act (FAA), 9 U.S.C. § 2, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising

> out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The Illinois Nursing Home Care Act (INHCA) provides, in pertinent part:

> § 3-606. Any waiver by a resident or his legal representative of the right to commence an action under Sections 3-601 through 3-607, whether oral or in writing, shall be null and void, and without legal force or effect.
>
> § 3-607. Any party to an action brought under Sections 3-601 through 3-607 shall be entitled to a trial by jury and any waiver of the right to a trial by a jury, whether oral or in writing, prior to the commencement of an action, shall be null and void, and without legal force or effect.

210 Ill. Comp. Stat. 45/3-606 and 3-607.

The Commerce Clause of the United States Constitution, as well as other provisions of the FAA and INHCA, are reprinted in the appendix to this petition (App., *infra*, 8a-11a).

STATEMENT

In enacting § 2 of the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp. v.*

Keating, 465 U.S. 1, 10 (1984). This Court recently reaffirmed what had already been "well-established" and "repeatedly reaffirmed": § 2 of the FAA preempts conflicting state law in proceedings before state courts. *Preston v. Ferrer*, 128 S. Ct. 978, 983 (2008) (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 684-85 (1996); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995); *Perry v. Thomas*, 482 U.S. 483, 489 (1987); *Southland*, 465 U.S. at 15-16).

The Appellate Court of Illinois ignored this Court's well-established FAA jurisprudence, holding that § 2 of the FAA does not preempt INHCA's anti-waiver provisions because "neither section [of the INHCA] specifically targeted arbitration agreements but rather prohibited any agreement which resulted in the deprivation of a nursing home resident's right to either commence an action under the Act or seek a jury trial in that action, and this court further held that the public policy expressed constituted a legitimate state law contract defense" (App., *infra*, 4a).

The ruling of the Appellate Court of Illinois is patently erroneous and conflicts with a long line of this Court's precedent holding that the FAA preempts state laws such as INHCA.

1. Charles Mitchell was a resident of VIP Manor, a nursing home operated by Petitioner in Wood River, Illinois. Upon his admission to VIP Manor on February 2, 2006, his wife, Virginia Mitchell signed an Arbitration Agreement (App., *infra*, 12a-16a) pursuant to her husband's power of attorney (App., *infra*, 17a-26a). The Arbitration

Agreement requires that a broad range of disputes be subject to arbitration:

> It is understood and agreed by Facility and Resident that any and all claims, disputes, and controversies (hereafter collectively referred to as a "claim" or collectively as "claims") arising out of, or in connection with, or relating in any way to the Admission Agreement or any service or health care provided by the Facility to the Resident shall be resolved exclusively by binding arbitration[.]

(App., *infra*, 12a). The Arbitration Agreement is applicable to all plaintiffs who bring a claim on Mr. Mitchell's behalf:

> It is the intention of the parties to this Arbitration Agreement that it shall inure to the benefit of and bind the parties, their successors, and assigns, including without limitation the agents, employees and servants of the Facility, and all persons whose claim is derived through or on behalf of the Resident, including any parent, spouse, sibling, child, guardian, executor, legal representative, administrator, or heir of the Resident.

(App., *infra*, 14a). The Arbitration Agreement expressly provides that the agreement is governed by the Federal Arbitration Act:

> The parties to this Arbitration Agreement acknowledge and agree that upon execution, this Arbitration Agreement becomes part of the Admission Agreement, and that the Admission Agreement evidences a transaction involving interstate commerce governed by the

> Federal Arbitration Act. This agreement shall be governed by and interpreted under the Federal Arbitration Act, 9 U.S.C. Sections 1-16.

(App., *infra*, 12a-13a). The Arbitration Agreement further provides:

> **THE PARTIES UNDERSTAND AND AGREE THAT THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES, AND THAT BY ENTERING INTO THIS ARBITRATION AGREEMENT, THE PARTIES ARE GIVING UP AND WAIVING THEIR CONSTITUTIONAL RIGHT TO HAVE ANY CLAIM DECIDED IN A COURT OF LAW BEFORE A JUDGE AND A JURY, AS WELL AS ANY APPEAL FROM A DECISION OR AWARD OF DAMAGES.**
>
> The Resident understands that (1) he/she has the right to seek legal counsel concerning this Arbitration Agreement, (2) that execution of this Arbitration Agreement is not a precondition to admission or to the furnishing of services to the Resident by the Facility, and (3) this Arbitration Agreement may be rescinded by written notice to the Facility from the Resident within thirty days of signature. If not rescinded within thirty days, this Arbitration Agreement shall remain in effect for all subsequent stays at the Facility, even if the Resident is discharged from and readmitted to the Facility.

> The undersigned certifies that he/she has read this Arbitration Agreement and that it has been fully explained to him/her, that he/she understands its contents, and has received a copy of the provision and that he/she is the Resident, or a person duly authorized by the Resident or otherwise to execute this agreement and accept its terms.

(App., *infra*, 14a-15a) (emphasis in original). Additionally, the Arbitration Agreement expressly states in two places that signing it is not a condition of admission: First, the document is entitled:

RESIDENT AND FACILITY ARBITRATION AGREEMENT (NOT A CONDITION OF ADMISSION – READ CAREFULLY)

(App., *infra*, 12a) (emphasis in original). Second, the Arbitration Agreement acknowledges, "The Resident Understands . . . execution of this Arbitration Agreement is not a precondition to admission or to the furnishing of services to the Resident by the facility." (A17).

2. Mr. Mitchell passed away after his admission to Petitioner's nursing home. Thereafter, Virginia Mitchell, as Executor of her husband's estate, filed a civil action against Petitioner in the Circuit Court for the Third Judicial Circuit, Madison County, Illinois. In her two-count complaint, Ms. Mitchell brought claims pursuant to the INHCA and the Illinois Wrongful Death Act (App., *infra*, 30a-38a). The Complaint alleged Petitioner failed to provide adequate care to Mr. Mitchell and that Petitioner's acts or omissions resulted in Mr. Mitchell's death.

3. Petitioner moved to compel arbitration, filing an affidavit in support of its motion setting forth facts establishing the arbitration agreement involved interstate commerce within the meaning of the FAA (App., *infra*, 27a-29a). Ms. Mitchell neither challenged this evidence nor produced any evidence to the contrary. Instead, she argued that the arbitration agreement were void and unenforceable under INHCA.

4. The Circuit Court denied Petitioner's motion to compel arbitration (App., *infra*, 1a-2a).

5. The Appellate Court of Illinois affirmed the Circuit Court's ruling (App., *infra*, 3a-5a), holding that § 2 of the FAA does not preempt INHCA's anti-waiver provisions because "neither section [of the INHCA] specifically targeted arbitration agreements but rather prohibited any agreement which resulted in the deprivation of a nursing home resident's right to either commence an action under the Act or seek a jury trial in that action, and this court further held that the public policy expressed constituted a legitimate state law contract defense" (App., *infra*, 4a).

It's reasoning was based entirely on its prior ruling in *Carter v. SSC Odin Operating Co., LLC*, 381 Ill.App.3d 717, 885 N.E.2d 1204 (Ill. App. 5th Dist. 2008), cert. denied, 129 S.Ct. 2734, ___ U.S. ___ (2009) (No. 08-805)[1].

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[1] The arguments raised in this Petition for Writ of Certiorari are substantially similar to those raised in the Petition for Writ of Certiorari prepared by counsel for SSC Odin Operating Co. in the *Carter* case. Although this Court denied the *Carter* Petition, the Illinois Supreme Court has since vacated its prior denial of SSC Odin Operating Co.'s petition for leave to appeal

6. The Appellate Court of Illinois denied Petitioner's motion for rehearing. (App., *infra*, 6a).

7. The Supreme Court of Illinois subsequently denied Petitioner's petition for leave to appeal (App., *infra*, 7a).

REASONS FOR GRANTING THE PETITION

This Court's review is necessary to ensure the proper and uniform application of the FAA. The lower court's decision stands in direct conflict with this Court's decisions in *Preston* and *Southland*, both of which demonstrate that a state statute need not "target" arbitration agreements in order to be preempted by § 2 of the FAA if the state statute, as applied, precludes the enforcement of arbitration agreements. The unanimous rulings of four federal circuit courts of appeals provide further evidence that the ruling below is patently erroneous.

Moreover, as this Court recognized in *Southland*, the "public policy" logic of the decision below would allow States to "wholly eviscerate" federally protected arbitration rights. *Southland*, 465 U.S. at 17 n.11. The decision below held that States may enact statutes that have the effect of

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and allowed the appeal. *See Carter v. SSC Odin Operating Co., LLC*, No. 106511 (Ill. Sup. Ct., August 7, 2009). The Illinois Supreme Court has since denied petitions for leave to appeal lower court decisions which refused to enforce arbitration agreements based exclusively on the precedent established by *Carter*. *See Blazier v. Beverly Enterprises-Illinois, Inc.*, No. 108114 (Ill. Sup. Ct., September 30, 2009) and *Mitchell v. Beverly Enterprises-Illinois, Inc.*, No. 108115 (Ill. Sup. Ct., September 30, 2009) (App., *infra*, 7a). These actions suggest the Illinois Supreme Court intends to affirm *Carter* and solidify Illinois state law in contravention of the Federal Arbitration Act and this Court's prior rulings.

precluding the enforcement of arbitration agreements so long as the state statute does not expressly mention arbitration. This Court considered—and expressly rejected—that argument in *Southland*, holding that Congress's pro-arbitration policy choice supersedes any contrary policy choice made by a State.

Accordingly, the Court should grant the petition for a writ of certiorari and, as it has done under similar circumstances, summarily reverse the judgment of the Appellate Court of Illinois. *See, e.g.*, *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 57 (2003) (per curium) (reversing summarily state supreme court ruling imposing an unduly narrow interpretation of the FAA's "involving commerce" requirement because this Court's decision fell "well within [its] previous pronouncements"). Alternatively, the Court should grant the petition for a writ of certiorari, consider this case on the merits, and reverse the judgment of the Appellate Court of Illinois.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S UNAMBIGUOUS PRECEDENT ADDRESSING THE PREEMPTIVE EFFECT OF THE FEDERAL ARBITRATION ACT

A. *Preston* and *Southland* Demonstrate That a State Statute Need Not "Target" Arbitration In Order to be Preempted and that the Logic of the Court Below Is Invalid

Section 2 of the FAA "supplies not simply a procedural framework applicable in federal courts; it also calls for the application, in state as well as

federal courts, of federal substantive law regarding arbitration." *Preston v. Ferrer*, 128 S. Ct. 978, 981 (2008). For example, "when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA." *Id.* at 987.

In *Preston*, an actor and his manager had agreed to arbitrate disputes arising under a management contract. *See id.* at 982-83. The plaintiff-manager later claimed that he was owed fees under the contract, but the defendant-actor claimed the contract was void because the plaintiff-manager was acting as an unlicensed talent agent. *See id.*

California's Talent Agencies Act specified that "[i]n cases of controversy arising under this chapter, the parties involved *shall* refer the matters in dispute to the Labor Commissioner, who shall hear and determine the same, subject to an appeal within 10 days after determination, to the superior court where the same shall be heard de novo." Cal. Lab. Code Ann. § 1700.44(a) (West 2003 & Supp. 2008) (emphasis added). Following the procedure prescribed by the state statute, the defendant-actor petitioned the state labor commissioner to decide whether the contract was unenforceable because it violated a state law requiring licensure of talent agents. *See Preston*, 128 S. Ct. at 982-83. The plaintiff-manager moved to compel arbitration, but the California Court of Appeal eventually refused to do so because it believed the FAA did not preempt actions before an administrative agency with exclusive jurisdiction over a dispute. *Id.*

After the Supreme Court of California denied the plaintiff-manager's petition for review, this Court granted the plaintiff-manager's petition for a writ of certiorari and reversed the judgment of the California Court of Appeal, finding that the issue was simply "who decides whether [the plaintiff-manager] acted as personal manager or as a talent agent." *Id.* at 987. In reversing the California Court of Appeal, this Court concluded that the motion to compel arbitration raised solely the question of which forum would hear the parties' dispute and the parties had not forfeited any substantive claims under the statute. *Id.* They were merely submitting to resolution in an arbitral, rather than a judicial or administrative, forum. *Id.* In other words, the parties had not waived causes of action under the state statute; instead, they had agreed who would decide such issues, and that "who" was an arbitrator.

As the Court itself acknowledged, the holding of *Preston* was hardly groundbreaking. *See id.* at 984 (recognizing that existing precedent "largely, if not entirely, resolve[d] the dispute before" the Court). This Court faced a similar question almost twenty-five years earlier in *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

In *Southland*, a California statute designed to protect franchisees contained an anti-waiver provision similar to those at issue here, which stated that "[a]ny condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void." *Id.* at 10 (citation omit ted). Like INHCA's anti-waiver provisions and the state statute at issue in *Preston*, the state statute in *Southland* did not expressly

mention arbitration. Despite that fact, the *Southland* Court reversed a Supreme Court of California decision refusing to compel arbitration, finding that the FAA withdraws the "power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Id.* at 12.

Moreover, the opinion for the Court in *Southland* expressly rejected the theory adopted by the Appellate Court of Illinois in the case below. In recognizing that § 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2 (emphasis added), the Court explained that § 2's savings clause did not allow state legislatures to countermand the pro-arbitration policy choice made by Congress.

In particular, the opinion for the Court responded to the dissenting opinion of Justice Stevens, which, applying the same rationale adopted by the Appellate Court of Illinois here, stated in relevant part:

> A contract which is deemed void is surely revocable at law or in equity, and the California legislature has declared all conditions purporting to waive compliance with the protections of the Franchise Disclosure Act, including but not limited to arbitration provisions, void as a matter of public policy. Given the importance to the State of franchise relationships, the relative disparity in the bargaining positions between the franchisor and the franchisee, and the

> remedial purposes of the California Act, I believe this declaration of State policy is entitled to respect.
>
> * * * * *
>
> We should not refuse to exercise independent judgment concerning the conditions under which an arbitration agreement, generally enforceable under the [FAA], can be held invalid as contrary to public policy simply because the source of the substantive law to which the arbitration agreement attaches is a State rather than the Federal Government.

Southland, 465 U.S. at 20-21 (Stevens, J., dissenting).

In response, the opinion for the Court in *Southland* expressly rejected the dissent's reasoning adopted by the Appellate Court of Illinois here, stating in relevant part:

> JUSTICE STEVENS dissents in part on the ground that § 2 of the Arbitration Act permits a party to nullify an agreement to arbitrate on "such grounds as exist at law or in equity for the revocation of any contract." We agree, of course, that a party may assert general contract defenses such as fraud to avoid enforcement of an arbitration agreement. We conclude, however, that the defense to arbitration found in the California Franchise Investment Law is not a ground that exists at law or in equity "for the revocation of any contract" but merely a ground that exists for the revocation of arbitration provisions in contracts subject to the California Franchise Investment Law. Moreover, under this

> dissenting view, "a state policy of providing special protection for franchisees . . . can be recognized without impairing the basic purposes of the federal statute." If we accepted this analysis, states could wholly eviscerate Congressional intent to place arbitration agreements upon the same footing as other contracts . . . simply by passing statutes such as the Franchise Investment Law. We have rejected this analysis because it is in conflict with the Arbitration Act and would permit states to override the declared policy requiring enforcement of arbitration agreements.

Southland, 465 U.S. at 16-17 n.11 (citations omitted; ellipses in original).

Despite this Court's decision in *Southland*, the Appellate Court of Illinois held that § 2 of the FAA does not preempt INHCA's anti-waiver provisions because "neither section [of the INHCA] specifically targeted arbitration agreements but rather prohibited any agreement which resulted in the deprivation of a nursing home resident's right to either commence an action under the Act or seek a jury trial in that action, and this court further held that the public policy expressed constituted a legitimate state law contract defense" (App., *infra*, 4a).

B. The Decision Below Is in Conflict with *Perry* and *Casarotto*

In *Perry v. Thomas*, 482 U.S. 483 (1987), the Court was asked to decide whether § 2 of the FAA preempted § 229 of the California Labor Code. On its face, the state statute in question "singled out"

arbitration agreements, providing that suits for the collection of wages could be maintained "without regard to the existence of any private agreement to arbitrate." *Id.* at 484 (quoting Cal. Lab. Code Ann. § 229 (West 1971)). The Court found that the pro-arbitration policy of the FAA placed it in "unmistakable conflict with California's § 229 requirement that litigants be provided a judicial forum for resolving wage disputes." *Id.* at 491. As a result, the Court held that the state statute had to "give way" under the Supremacy Clause. *Id.*

In finding the state statute preempted, the opinion for the Court included a footnote reading, in relevant part:

> In instances such as these, the text of § 2 provides the touchstone for choosing between state-law principles and the principles of federal common law envisioned by the passage of that statute: An agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law, see Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983), "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). Thus state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2. . . . A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe

> that agreement in a manner different from that in which it otherwise construes non-arbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.

Id. at 492 n.9 (citations omitted).

Several years later, in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), the Court held that the FAA preempted a Montana statute conditioning the enforceability of arbitration agreements on compliance with a first-page notice requirement. As in *Perry*, the state statute at issue in *Casarotto* "singled out" arbitration by making arbitration clauses "unenforceable unless '[n]otice that [the] contract is subject to arbitration' is 'typed in underlined capital letters on the first page of the contract.'" *Id.* at 683 (quoting Mont. Code Ann. § 27-5-114(4) (1995)) (brackets sup plied by *Casarotto* Court). In finding the state statute preempted, the Court referenced the *Perry* footnote and explained that, under the savings clause of § 2 of the FAA, courts could not "invalidate arbitration agreements under state laws applicable only to arbitration provisions." *Id.* at 687.

Read correctly, *Perry* and *Casarotto* stand for the proposition that § 2 of the FAA preempts those state laws that "single out" arbitration agreements for special treatment. As demonstrated by *Southland* and *Preston*, however, *Perry* and *Casarotto* do not stand for the converse proposition:

namely, that state laws avoid FAA preemption so long as they do not "single out" arbitration agreements for special treatment. Instead, *Southland* and *Preston* make clear that state statutes are preempted by the FAA if the state statutes *as applied* preclude the enforcement of federally protected arbitration rights, regardless of whether the state statutes "single out" or "target" arbitration agreements. The decision of the Appellate Court of Illinois is predicated on a misunderstanding of this fundamental concept.

II. THE DECISION BELOW CONFLICTS WITH THE LAW OF FOUR FEDERAL CIRCUITS ADDRESSING THE PREEMPTIVE EFFECT OF THE FEDERAL ARBITRATION ACT

In relevant part, § 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). Contrary to the decision below, the federal courts of appeals have unanimously held that the FAA preempts a state law that invalidates only certain types of clauses in some, but not all, contracts, regardless of whether the state law mentions arbitration. *See Bradley v. Harris Research, Inc.*, 275 F.3d 884, 889-90 (9th Cir. 2001); *OPE Int'l LP v. Chet Morrison Contractors, Inc.*, 258 F.3d 443, 447 (5th Cir. 2001) (per curiam); *KKW Enters., Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 50-51 (1st Cir. 1999); *Doctor's Assocs., Inc. v. Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998), cert. denied, 525 U.S. 1103 (1999) (No. 98-630).

In *Bradley v. Harris Research, Inc.*, 275 F.3d 884 (9th Cir. 2001), the Ninth Circuit was asked to decide whether the FAA preempted a California statute that had the effect of voiding forum-selection clauses in franchise agreements if the clauses restricted venue to an out-of-state forum. *See id.* at 889.[2] Relying on decisions from the First, Second and Fifth Circuits, the Ninth Circuit held that § 2 of the FAA preempted the California statute because the California statute applied "only to forum selection clauses and only to franchise agreements; it therefore does not apply to 'any contract.'" *Id.* at 890 (quoting 9 U.S.C. § 2).

In *Bradley*, the appellee-franchisees contended — like the Appellate Court of Illinois in this case — that the California statute was not preempted "because it treats arbitration and litigation equally and does not single out arbitration as a disfavored form of dispute resolution." *Id.* at 889. The Ninth Circuit rejected that argument outright, holding that "only state law that addresses the enforcement of 'contracts generally' is not preempted by the FAA." *Id.* (quoting *Casarotto*, 517 U.S. at 686-87). As *Bradley* explained, even if a state statute places arbitration on "equal footing" with litigation, it is preempted by the FAA if it invalidates only certain types of clauses in certain types of contracts. *See id.*

The Fifth Circuit applied similar reasoning in *OPE International LP v. Chet Morrison Contractors,*

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[2] The California statute at issue in *Bradley* provided that "[a] provision in a franchise agreement restricting venue to a forum outside this state is void with respect to any claim arising under or relating to a franchise agreement involving a franchise business operating within this state." Cal. Bus. & Prof. Code Ann. § 20040.5.

Inc., 258 F.3d 443 (5th Cir. 2001) (per curiam). There, the appellant argued that the arbitration agreement in question was invalid under a Louisiana statute that voided out-of-state forum-selection clauses in certain construction contracts. *See id.* at 446.[3] The Fifth Circuit disagreed, holding that a state law that places a requirement on arbitration clauses "not applicable to contracts generally" is preempted by § 2 of the FAA. *Id.* at 447. The Fifth Circuit held that the state statute, which did not "target" arbitration for special treatment, "'directly conflicts with § 2 of the FAA because the State's law conditions the enforceability of arbitration agreements on compliance with a . . . requirement not applicable to contracts generally.'" *Id.* (quoting *Casarotto*, 517 U.S. at 687) (alteration omitted); *see also Commerce Park v. Mardian Constr. Co.*, 729 F.2d 334, 337 (5th Cir. 1984) (holding that state statute, which voided any waiver of rights under a state deceptive trade practices statute, was preempted by the FAA even though the state statute did not mention arbitration).

To the same effect is *KKW Enterprises, Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42 (1st Cir. 1999). There, the First Circuit held that a Rhode Island statute applicable only to forum-selection clauses in franchise agreements was preempted by § 2 of the FAA because the state

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[3] The Louisiana statute at issue in *OPE International* rendered "null and void and unenforceable as against public policy any provision in a contract" for certain types of construction that required a "suit or arbitration proceeding to be brought in a forum or jurisdiction outside of this state." La. Rev. Stat. Ann. § 9:2779.

statute "[did] not apply to all contracts and [did] not establish a generally applicable contract defense." *Id.* at 52. Like the state statutes addressed by *Bradley* and *OPE International*, the Rhode Island statute at issue in *KKW Enterprises* voided any provision in a franchise agreement restricting venue to an out-of-state forum. *See id.* at 50.[4] The First Circuit reasoned that only state statutes that apply to "any contract" are consistent with the FAA. *Id.* at 50-51. "Because [the state statute] limits the statute's application to one type of provision, venue clauses, in one type of agreement, franchise agreements, the statute does not apply to any contract." *Id.* at 51. Therefore, the First Circuit held that the Rhode Island statute was preempted by the FAA. *Id.*

Similarly, in *Doctor's Associates, Inc. v. Hamilton*, 150 F.3d 157 (2d Cir. 1998), cert. denied, 525 U.S. 1103 (1999) (No. 98-630), the Second Circuit held that § 2 of the FAA preempted a rule of law established by the Supreme Court of New Jersey in *Kubis & Perszyk Associates, Inc. v. Sun Microsystems, Inc.*, 680 A.2d 618 (N.J. 1996), in which the state high court found that a forum-selection clause in a franchise agreement was presumptively invalid under the New Jersey Franchise Practices Act if the clause designated an out-of-state judicial forum. The franchisee in *Hamilton* argued that the state-law precedent should be extended to invalidate such forum-selection clauses as they related to arbitration. *See* 150 F.3d

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[4] The Rhode Island statute at issue in *KKW Enterprises* read: "A provision in a franchise agreement restricting jurisdiction or venue to a forum outside this state is void with respect to a claim otherwise enforceable under this act." R.I. Gen. Laws § 19-28.1-14.

at 163. The Second Circuit rejected the franchisee's argument, explaining:

> *Kubis* did not establish a "generally applicable" contract defense that applies to "any" contract; it invalidated a franchise agreement's forum selection clause under the New Jersey Franchise Practices Act because it required the franchisee to sue in another jurisdiction. The *Kubis* decision applies to one sort of contract provision (forum selection) in only one type of contract (a franchise agreement). Therefore, to the extent that *Kubis* can be read to invalidate arbitral forum selection clauses in franchise agreements, it is preempted by the FAA.

Id.; *see also Stawski Distrib. Co. v. Browary Zywiec S.A.*, 349 F.3d 1023, 1024-26 (7th Cir. 2003) (overturning district court order denying a "stay [of] litigation in favor of arbitration" and holding that Illinois statute governing contracts between brewers and distributors was preempted because it did not apply generally to all contracts).

These cases demonstrate that four federal courts of appeals have applied the unambiguous language of § 2's savings clause to hold that courts may not refuse to enforce arbitration agreements based on state-law grounds other than "grounds that exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). A state law that invalidates only certain types of clauses in certain types of contracts is not a "ground[] that exist[s] at law or in equity for the revocation of any contract," and therefore any such state law is preempted by the FAA to the extent that it precludes enforcement of arbitration agreements.

Because INHCA's anti-waiver provisions invalidate only certain types of clauses (waivers of the right to commence an action under INHCA and to have such cases tried by a jury) in certain types of contracts (agreements subject to INHCA), well-established circuit precedent demonstrates that the savings clause of § 2 does not apply and the Appellate Court of Illinois's ruling is erroneous.

III. THE PETITION RAISES SUBSTANTIAL QUESTIONS OF FEDERAL LAW

"The 'singling out' theory"—whereby courts hold that a state statute must "target" or "single out" arbitration agreements in order to be preempted by the FAA—is best viewed as a "backdoor attempt to have the Supreme Court overrule *Southland*, which it already has refused to do." Christopher R. Drahozal, Federal Arbitration Act Preemption, 79 Ind. L.J. 393, 410 (2004) (Drahozal). Professor Drahozal correctly observes that the "'singling out' phrasing comes from language in Supreme Court cases, not from the [FAA] itself, and is contraindicated by other language in the Court's own opinions." *Id.* at 409 (footnotes omitted). Echoing the concern expressed by this Court in *Southland*, Professor Drahozal concludes that

> the "singling out" interpretation of FAA preemption would permit states to eviscerate the FAA entirely. Under that interpretation, a state law that invalidated all pre-dispute waivers of the right to jury trial would not be preempted by the FAA because it did not single out arbitration clauses: it also would invalidate jury trial waivers in court selection clauses. And yet such a state law would make

> arbitration agreements wholly unenforceable in the state, because by definition arbitration clauses provide for an arbitrator, rather than a jury, to resolve the parties' dispute. Nothing in the FAA or the Supreme Court's interpretations of the FAA supports such a result. In short, courts should reject the view that the FAA preempts only state laws that single out arbitration clauses.

Id. at 410 (footnotes omitted).

Contrary to the decision below, federal preemption analysis does not look solely to the language of the state statute to determine whether it is preempted by federal law. "[S]tate law may nonetheless be preempted to the extent that it actually conflicts with federal law—that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Volt Info. Scis., Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1988) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Nor is the state statutory language at issue here unique to Illinois. At least two other States have enacted virtually identical anti-waiver provisions in the nursing facility context. Oklahoma's Nursing Home Care Act, for example, provides that "[a]ny waiver by a resident or the legal representative of the resident of the right to commence an action under this section, whether oral or in writing, shall be null and void, and without legal force or effect." Okla. Stat. tit. 63, § 1-1939(D). In similar fashion, the Oklahoma statute also provides that "[a]ny party to an action brought under

this section shall be entitled to a trial by jury and any waiver of the right to a trial by a jury, whether oral or in writing, prior to the commencement of an action, shall be null and void, and without legal force or effect." § 1-1939(E); *see also* W. Va. Code § 16-5C-15(c) ("Any waiver by a resident [of a nursing facility] or his or her legal representative of the right to commence an action under this section, whether oral or in writing, shall be null and void as contrary to public policy.").

Unlike the decision of the Appellate Court of Illinois in this case, however, the FAA has been held to preempt Oklahoma's identical anti-waiver provisions. In *Rainbow Health Care Center, Inc. v. Crutcher*, No. 07-CV-194-JHP, 2008 WL 268321 (N.D. Okla. Jan. 29, 2008), a nursing facility filed suit against the head of a state regulatory agency seeking a declaratory judgment that Oklahoma's anti-waiver provisions were preempted by the FAA after the state agency threatened to revoke the plaintiff-facility's license because the plaintiff-facility included certain arbitration provisions in its admission agreements. See *id.* at *1. The district court held the FAA did in fact preempt Oklahoma's anti-waiver provisions, explaining: "In enacting the FAA, Congress expressed a national policy favoring enforcement of arbitration agreements, and there is nothing to suggest that Congress ever intended to carve out an exception to that broad policy allowing the state of Oklahoma to *disfavor* arbitration agreements in nursing home admission agreements." *Id.* at *8. The defendant-official did not appeal the district court's ruling.

A different federal district court in Oklahoma reached a similar conclusion in *Sooner Geriatrics,*

L.L.C. v. Crutcher, No. CIV-07-244-M, 2007 WL 2900535 (W.D. Okla. Oct. 3, 2007). There, the district court granted several nursing facilities' request for a preliminary injunction after the same state regulatory agency cited the plaintiff-facilities for including certain arbitration provisions in their admission agreements that the state agency believed violated Oklahoma's anti-waiver provisions. *See id.* at *6. The district court later converted its preliminary injunction into a permanent injunction after the defendant-official failed to contest the plaintiff facilities' motion to confess judgment, finding that the FAA preempted Oklahoma's anti-waiver provisions. *See Sooner Geriatrics, L.L.C. v. Crutcher*, No. CIV-07-244-M, slip op. (W.D. Okla. May 27, 2008). As in *Rainbow Health Care Center*, the defendant official in Sooner Geriatrics did not appeal the district court's ruling.

Despite these federal court rulings holding that Oklahoma's anti-waiver provisions are preempted by the FAA, Oklahoma's state courts have proven extremely hostile to claims that the FAA preempts Oklahoma's anti-waiver provisions. In *Bruner v. Timberland Manor Ltd. Partnership*, 155 P.3d 16 (Okla. 2006), the Supreme Court of Oklahoma upheld a trial court's refusal to enforce an arbitration agreement between a nursing facility and a resident after the trial court held the FAA did not preempt Oklahoma's anti-waiver provisions. To reach this result, the Bruner court applied an overly narrow construction of the FAA, finding that the FAA did not reach what the court characterized as the "profoundly local transaction" evidenced by the agreement between the nursing facility and its resident. *Id.* at 31. In doing so, the Bruner court

expressly disagreed with contrary rulings issued by three other state supreme courts. *See id.* at 29-30 (disagreeing with *McGuffrey Health & Rehab. Ctr. v. Jackson*, 864 So. 2d 1061 (Ala. 2003); *Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507 (Miss. 2005); and *In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67 (Tex. 2005)). *But see Rainbow Health Care Center*, 2008 WL 268321, at *6 (rejecting *Bruner*'s interstate commerce analysis); Stanley A. Leasure, Arbitration of Nursing Home Claims: Oklahoma Goes Its Own Way, 60 Okla. L. Rev. 737, 767-68 (2007) (questioning *Bruner*'s reasoning in light of contrary state supreme court rulings).

There is only one FAA, the interpretation of which should be uniform regardless of whether one sues in state court or in federal court. As *Rainbow Health Care Center*, *Sooner Geriatrics*, *Bruner*, and the decision below demonstrate, such is not the case in the context of arbitration agreements between nursing facilities and their residents.

This case implicates much more than just state statutes related to disputes between nursing facilities and their residents, however. This case — and the obvious disregard for this Court's FAA jurisprudence — implicates the very type of judicial hostility to arbitration § 2 of the FAA was designed to overcome. The "target" theory adopted by the court below represents the second front in state courts' efforts to circumvent this Court's FAA jurisprudence. *See* Drahozal, 79 Ind. L.J. at 410.

"[C]ourts must be on guard for artifices in which the ancient suspicion of arbitration might reappear." *Securities Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1119 (1st Cir. 1989). The rule adopted by

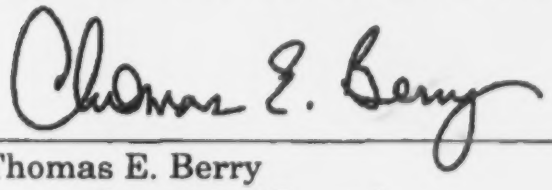
the Appellate Court of Illinois, whereby a state statute may avoid FAA preemption if a violation of public policy is a generally applicable contract defense and the state statute in question does not "target" arbitration agreements, is one such "artifice" that must be rejected outright lest the lower court's decision serve as a roadmap for how other state courts and state legislatures can frustrate the pro-arbitration policy choice made by Congress through the use of selective (and patently erroneous) parsing of this Court's FAA jurisprudence.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari and summarily reverse the judgment of the Appellate Court of Illinois. Alternatively, the Court should grant the petition for a writ of certiorari, consider this case on the merits and reverse the judgment of the Appellate Court of Illinois.

Respectfully submitted.

SANDBERG PHOENIX & VON GONTARD P.C



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DECEMBER 2009

APPENDICES

APPENDIX A

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

VIRGINIA MITCHELL, Executor of the Estate of CHARLES A. MITCHELL,	)	**FILED**
	)	**Oct 24, 2007**
	)	**Clerk of Circuit**
v.	)	**Court #66**
	)	**Madison County,**
BEVERLY ENTERPRISES – ILLINOIS, INC., d/b/a VIP MANOR	)	**Illinois**
	)	
	)	07-L-93
	)	
Defendant.	)	

ORDER

Cause called for hearing on Defendant's Renewed Motion to Compel Arbitration/Motion to Reconsider the court's ruling on Motion to Compel Arbitration. At the time of its initial ruling the court specifically allowed Defendant leave to file a Reply Memorandum to Plaintiff's Memo in Opposition that was filed on the day of the hearing.

This court upon review of all pleadings and memorandums, upon hearing argument and for cause shown reconsiders Defendant's Motion To Compel Arbitration. The court Denies Defendant's Motion To Compel Arbitration.

s/Robert H. Gregory for Plaintiff

s/Jeffrey Dunn for Defendant

10/24/07
Date

s/Daniel J. Stack
Judge

APPENDIX B

NO. 5-08-0011

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

VIRGINIA MITCHELL, Executor of the Estate of Charles A. Mitchell, Deceased	)	**FILED** **Dec 22 2008** **Louis E. Costa** **Clerk Appellate**
Plaintiff-Appellee	)	**Court, 5th Dist.**
v.	)	Appeal from the Circuit Court of
BEVERLY ENTERPRISES – ILLINOIS, INC., d/b/a VIP MANOR	)	Madison County
	)	No. 07-L-93
Defendant-Appellant	)	Honorable Daniel J. Stack, Judge, presiding.

SUMMARY ORDER

Defendant, Beverly Enterprises-Illinois, Inc., doing business as VIP Manor, appeals the denial by the circuit court of Madison County of its motion to compel arbitration. Subsequent to the original briefing of this cause by the parties, this court decided *Carter v. SSC Odin Operating Co., LLC*, 381

Ill. App. 3d 717, 885 N.E.2d 1204 (2008). Plaintiff, Virginia Mitchell, executor of the estate of Charles A. Mitchell, deceased, filed a motion pursuant to Supreme Court Rule 361(h) (210 Ill. 2d R. 361(h)) to dismiss the appeal based on *Carter*. Defendant filed a response to plaintiff's motion to dismiss, arguing that *Carter* was not precedential with regard to the issues of the appeal and that it was wrongly decided. We ordered supplemental briefing and heard oral argument. We agree that *Carter* controls the outcome of this case, and we affirm the order of the circuit court pursuant to Supreme Court Rule 23(c)(166 Ill. 2d R. 23(c)).

The central issue in this appeal is whether sections 3-606 and 3-607 of the Nursing Home Care Act (Act) (210 ILCS 45/3-606, 3-607 (West 2006)), prohibiting a waiver of any right to commence an action or seek a jury trial on a claim brought pursuant to the Act, are preempted by the Federal Arbitration Act (9 U.S.C. § 1et seq. (2000)). Our ruling in *Carter* held that these statutory provisions were not preempted. This court held, correctly in our view, that neither section specifically targeted arbitration agreements but rather prohibited any agreement which resulted in the deprivation of a nursing home resident's right to either commence an action under the Act or seek a jury trial in that action, and this court further held that the public policy expressed constituted a legitimate state law contract defense and, accordingly, was not preempted.

Defendant accurately notes that plaintiff herein argued unconscionability and that *Carter* did not specifically address unconscionability. *Carter*, however, generally addressed the question of

preemption, and its holding covers the situation in this appeal, regardless of the legal argument made by plaintiff in the trial court and in her brief to this court. Defendant's response generally attacks the soundness of our court's holding in *Carter*, the arguments for which we find unconvincing. We disagree with defendant's position that *Carter* is incorrectly decided in light of *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 134 L. Ed.2d 902, 116 S. Ct. 1652 (1996), *Southland Corp. v. Keating*, 465 U.S. 1, 79 L. Ed. 2d 1, 104 S. Ct. 852 (1984), or *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983). Defendant argues that the defendant in *Carter* has filed a petition for leave to appeal to the Illinois Supreme Court and that, accordingly, the Carter holding is not sufficiently sound for the disposition of this case. We note that the supreme court has since denied leave to appeal. *People v. Carter*, 229 Ill. 2d 618, __ N.E.2d ___ (2008) (table). Carter is sufficient authority upon which to decide the merits of the appeal before us.

For the reasons stated above, and pursuant to Supreme Court Rule 23(c)(2) (166 Ill. 2d R. 23 (c)(2)), we affirm the circuit court's denial of defendant's motion to compel arbitration, and we remand the cause to the Circuit Court for the Third Judicial Circuit, Madison County, Illinois, for further proceedings.

Affirmed; cause remanded.

GOLDENHERSH, J., with WEXSTTEN, P.J., and CHAPMAN, J., concurring.

APPENDIX C

NO. 5-07-0637

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

VIRGINIA MITCHELL, Executor of the Estate of CHARLES A. MITCHELL,	)	**FILED** **Jan 28 2009** **Louis E. Costa** **Clerk Appellate**
Plaintiff-Appellee	)	**Court, 5th Dist.**
v.	)	Appeal from the Circuit Court of
BEVERLY ENTERPRISES – ILLINOIS, INC., d/b/a VIP MANOR	)	Madison County
	)	No. 07-L-93
Defendant-Appellant	)	

ORDER

This cause has been considered on defendant-appellant's petition for rehearing and application for a Supreme Court Rule 316 certificate of importance; and the court being advised in the premises;

IT IS THEREFORE ORDERED that the petition for rehearing and for certificate of importance shall be and the same hereby is, denied.

APPENDIX D

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

September 30, 2009

Mr. Jon W. Jordan
Sandberg, Phoenix & von Gontard, P.C.
One City Centre, 15th Floor
St. Louis, MO 63101-1880

No. 108115 – Virginia Mitchell, etc., respondent,
v. Beverly Enterprises-Illinois, Inc., etc., petitioner.
Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on November 4, 2009.

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 9, Clause 3 of the United States Constitution (the Commerce Clause) provides, in pertinent part:

> The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

2. Article VI, Clause 2 of the United States Constitution (the Supremacy Clause) provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

3. Sections 1 and 2 of the Federal Arbitration Act, 9 U.S.C. §§ 1-2, provide:

> **§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title**
>
> "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein

defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

4. The Illinois Nursing Home Care Act, Chapter 210, Act 45, Article III, Part 6 of the Illinois Compiled Statutes, provides, in pertinent part:

45/3-601. Liability to residents

§ 3-601. The owner and licensee are liable to a resident for any intentional or negligent act or omission of their agents or employees which injures the resident.

45/3-602. Actual damages; costs and attorney's fees

§ 3-602. The licensee shall pay the actual dam ages and costs and attorney's fees to a facility resident whose rights, as specified in Part 1 of Article II of this Act, are violated.

45/3-603. Actions; injunctive and declaratory relief

§ 3-603. A resident may maintain an action under this Act for any other type of relief, including injunctive and declaratory relief, permitted by law.

45/3-604. Class actions

§ 3-604. Any damages recoverable under Sections 3-601 through 3-607, including minimum damages as provided by these Sections, may be recovered in any action which a court may authorize to be brought as a class action pursuant to the Civil Practice Law. The remedies provided in Sections 3-601 through 3-607, are in addition to and cumulative with any other legal remedies available to a resident. Exhaustion of any available administrative remedies shall not be required prior to commencement of suit hereunder.

45/3-605. Medical assistance; exemption of damages recovered

§ 3-605. The amount of damages recovered by a resident in an action brought under Sections 3-601 through 3-607 shall be exempt for purposes of determining initial or continuing eligibility for medical assistance under "The Illinois Public Aid Code", as now or hereafter amended, and shall neither be taken into consideration nor required to be applied toward the payment or partial payment of

the cost of medical care or services available under "The Illinois Public Aid Code".

45/3-606. Waiver of right to sue

§ 3-606. Any waiver by a resident or his legal representative of the right to commence an action under Sections 3-601 through 3-607, whether oral or in writing, shall be null and void, and without legal force or effect.

45/3-607. Jury trial; waivers

§ 3-607. Any party to an action brought under Sections 3-601 through 3-607 shall be entitled to a trial by jury and any waiver of the right to a trial by a jury, whether oral or in writing, prior to the commencement of an action, shall be null and void, and without legal force or effect.

* * * * *

APPENDIX F

RESIDENT AND FACILITY ARBITRATION AGREEMENT (NOT A CONDITION OF ADMISSION – READ CAREFULLY)

This Arbitration Agreement is executed by VIP Manor (the "Facility") and Charles Mitchell ("Resident" or "Resident's Authorized Representative", hereafter collectively referred to as "Resident") in conjunction with an agreement for admission and for the provision of nursing facility services (the "Admission Agreement") by Facility to Resident. The parties to this Arbitration Agreement acknowledge and agree that upon execution, this Arbitration Agreement becomes part of the Admission Agreement, and that the Admission Agreement evidences a transaction involving interstate commerce governed by the Federal Arbitration Act. It is understood and agreed by Facility and Resident that any and all claims, disputes, and controversies (hereafter collectively referred to as a "claim" or collectively as "claims") arising out of, or in connection with, or relating in any way to the Admission Agreement or any service or health care provided by the Facility to the Resident shall be resolved exclusively by binding arbitration to be conducted at a place agreed upon by the Parties, or in the absence of such an agreement, at the Facility, in accordance with the National Arbitration Forum Code of Procedure, which is

hereby incorporated into this Agreement\ [5], and not by a lawsuit or resort to court process. This agreement shall be governed by and interpreted under the Federal Arbitration Act, 9 U.S.C. Sections 1-16.

This agreement to arbitrate includes, but is not limited to, any claim for payment, nonpayment, or refund for services rendered to the Resident by the Facility, violations of any right granted to the Resident by law or by the Admission Agreement, breach of contract, fraud or misrepresentation, negligence, gross negligence, malpractice, or claims based on any departure from accepted medical or health care or safety standards, as well as any and all claims for equitable relief or claims based on contract, tort, statute, warranty, or any alleged breach, default, negligence, wantonness, fraud, misrepresentation, suppression of fact, or inducement. However, this agreement shall not limit the Resident's right to file a grievance or complaint with the Facility or any appropriate government agency from requesting an inspection form such an agency or from seeking review under 42 C.F.R. section 431.200 *et seq*. of a decision to transfer or discharge the Resident.

The parties agree that damages awarded, if any, in an arbitration conducted pursuant to this Arbitration Agreement shall be determined in accordance with the provisions of the state or federal

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[5] Information about the National Arbitration Forum, including a complete copy of the code of Procedure, can be obtained from the forum at 800-474-2371, by fax at 651-604-6778 or toll-free fax at 866-743-4517, or ion the internet at http://www.arb-forum.com.

law applicable to a comparable civil action, including any prerequisites to, credit against, or limitations on, such damages. Any award of the arbitrator(s) may be entered as a judgment in any court having jurisdiction. In the event a court having jurisdiction finds any portion of this agreement unenforceable, that portion shall not be effective and the remainder of the agreement shall remain effective.

It is the intention of the parties to this Arbitration Agreement that it shall inure to the benefit of and bind the parties, their successors, and assigns, including without limitation the agents, employees and servants of the facility, and all persons whose claim is derived through or on behalf of the Resident including any parent, spouse, sibling, child, guardian, executor, legal representative, administrator, or heir of the Resident. The parties further intend that this agreement is to survive the lives or existence of the parties hereto.

All claims based in whole or part of the same incident, transaction, or related course of care or services provided by the Facility to the Resident shall be arbitrated in one proceeding. A claim shall be waived and forever barred if it arose and should reasonably have been discovered prior to the date upon which notice of arbitration is given to the Facility or received by the Resident and such claim is not presented in the arbitration proceeding.

THE PARTIES UNDERSTAND AND AGREE THAT THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES, AND THAT BY ENTERING INTO THIS ARBITRATION AGREEMENT, THE PARTIES ARE

GIVING UP AND WAIVING THEIR CONSTITUTIONAL RIGHT TO HAVE ANY CLAIM DECIDED IN A COURT OF LAW BEFORE A JUDGE AND A JURY, AS WELL AS ANY APPEAL FROM A DECISION OR AWARD OF DAMAGES.

The resident understands that (1) he/she has the right to seek legal counsel concerning this Arbitration Agreement, (2) that execution of this Arbitration Agreement is not a precondition to admission or to the furnishing of services to the Resident by the Facility, and (3) this Arbitration Agreement ma be rescinded by written notice to the Facility from the Resident within thirty days of signature. If not rescinded within thirty days, this arbitration Agreement shall remain in effect for all subsequent stays at the Facility, even if the Resident is discharged from and readmitted to the Facility.

The undersigned certifies that he/she has read this Arbitration Agreement and that is has been fully explained to him/her, that he/she understands its contents, and has received a copy of the provision and that he/she is the Resident, or a person duly authorized by the Resident or otherwise to execute this agreement and accept its terms.

Date: _____

Signature: _____

Witness: _____

If the resident is unable to consent or sign this provision because of physical disability or mental incompetence or is a minor and an authorized representative is signing this provision, complete the following:

Date: 02-02-06

Relationship to Resident: Spouse – POA

Signature: s/Virginia R. Mitchell
(Authorized representative)

Witness: s/Sarah Drury

For Facility:

Date: 02-02-06

Authorized Representative
Signature: s/Sarah Drury

Print Name and Title: Sarah Drury SSC

APPENDIX G

ILLINOIS STATUTORY SHORT FORM POWER OF ATTORNEY FOR HEALTH CARE

(NOTICE: THE PURPOSE OF THIS POWER OF ATTORNEY IS TO GIVE THE PERSON YOU DESIGNATE (YOUR "AGENT") BROAD POWERS TO MAKE HEALTH CARE DECISIONS FOR YOU, INCLUDING POWER TO REQUIRE CONSENT TO OR WITHDRAW ANY TYPE OF PERSONAL CARE OR MEDICAL TREATMENT FOR ANY PHYSICAL OR MENTAL CONDITION AND TO ADMIT YOU TO OR DISCHARGE YOU FROM ANY HOSPITAL, HOME, OR OTHER INSTITUTION. THIS FORM DOES NOT IMPOSE A DUTY ON YOUR AGENT TO EXERCISE GRANTED POWERS, BUT WHEN POWERS ARE EXERCISED, YOUR AGENT WILL HAVE TO USE DUE CARE TO ACT FOR YOUR BENEFIT AND IN ACCORDANCE WITH THIS FORM AND KEEP A RECORD OF RECEIPTS. DISBURSEMENTS AND SIGNIFICANT ACTIONS TAKEN AS AGENT, A COURT CAN TAKE AWAY THE POWERS OF YOUR AGENT IF IT FINDS THE AGENT IS ACTING IMPROPERLY, YOU MAY NAME SUCCESSOR AGENTS UNDER THIS FORM BUT NOT CO-AGENTS, AND NO HEALTH CARE PROVIDER MAY BE NAMED UNLESS YOU EXPRESSLY LIMIT THE DURATION OF THIS POWER IN THE MANNER PROVIDED BELOW, UNTIL YOU REVOKE THIS POWER OR A COURT ACTING ON YOUR BEHALF TERMINATES IT, YOUR AGENT MAY EXERCISE THE POWERS GIVEN HERE THROUGHOUT YOUR LIFETIME, EVEN AFTER YOU BECOME DISABLED. THE POWERS YOU GIVE YOUR AGENT, YOUR RIGHT

TO REVOKE THOSE POWERS AND THE PENALTIES FOR VIOLATING THE LAW ARE EXPLAINED MORE FULLY IN SECTIONS 45/4-5, 4-8, 4-9 AND 4-10(b) OF THE "ILLINOIS POWERS OF ATTORNEY FOR HEALTH CARE LAW" OF WHICH THIS FORM IS PART (SEE THE BACK OF THIS FORM). THAT LAW EXPRESSLY PERMITS THE USE OF ANY DIFFERENT FORM OF POWER OF ATTORNEY YOU MAY DESIRE, IF THERE IS ANYTHING ABOUT THIS FORM THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A LAWYER TO EXPLAIN IT TO YOU.)

Power of Attorney made this 8th day of November, 2000.

1. I, CHARLES A. MITCHELL, of 500 Summit Avenue, Wood River, IL 62095 hereby appoint: VIRGINIA R. MITCHELL, my wife, of 500 Summit Avenue, Wood River, IL 62095 as my attorney-in-fact (my "agent") to act for me and in my name (in any way I could act in person) to make any and all decisions for me concerning my personal care, medical treatment, hospitalization and health care and to require, withhold or withdraw any type of medical treatment or procedure, even though my death may ensue. My agent shall have the same access to my medical records that I have, including the right to disclose the contents to others.

My agent shall also have full power to authorize an autopsy and direct the disposition of my remains. Effective upon my death, my agent has the full power to make an anatomical gift, of the following (initial one):

___ Any organ.

___ Specific organs:_____

THE ABOVE GRANT OF POWER IS INTENDED TO BE AS BROAD AS POSSIBLE SO THAT YOUR AGENT WILL HAVE AUTHORITY TO MAKE ANY DECISION YOU COULD MAKE TO OBTAIN OR TERMINATE ANY TYPE OF HEALTH CARE, INCLUDING WITHDRAWAL OF FOOD AND WATER AND OTHER LIFE SUSTAINING MEASURES, IF YOUR AGENT BELIEVES SUCH ACTION WOULD BE CONSISTENT WITH YOUR INTENT AND DESIRES. IF YOU WISH TO LIMIT THE SCOPE OF YOUR AGENTS POWERS OR PRESCRIBE SPECIAL RULES OR LIMIT THE POWER TO MAKE AN ANATOMICAL GIFT, AUTHORIZE AUTOPSY OR DISPOSE OF REMAINS, YOU MAY DO SO IN THE FOLLOWING PARAGRAPHS.)

2. The powers granted above shall not include the following powers or shall be subject to the following rules or limitations (here you may include any specific limitations you deem appropriate, such as your own definition of when life-sustaining measures should be withheld; a direction to continue food and fluids or life-sustaining treatment in all events; or instructions or refuse any specific types of treatment that are inconsistent with your religious beliefs or unacceptable to you for any other reason, such as blood transfusion, electro-convulsive therapy, amputation, psychosurgery, voluntary admission to a mental institution, etc.):

_____

_____

(THE SUBJECT OF LIFE-SUSTAINING TREATMENTS IS OF PARTICULAR IMPORTANCE FOR YOUR CONVENIENCE IN

DEALING WITH THAT SUBJECT, THE GENERAL STATEMENTS CONCERNING THE WITHHOLDING OR REMOVAL OF LIFE-SUSTAINING TREATMENT ARE SET FORTH BELOW, IF YOU AGREE WITH ONE OF THESE STATEMENTS, YOU MAY INITIAL THAT STATEMENT, BUT DO NOT INITIAL MORE THAN ONE):

s/CAM I do not want my life to be prolonged nor do I want life-sustaining treatment to be provided or continued if my agent believes the burdens of the treatment outweigh the expected benefits. I want my agent to consider the relief of suffering, the expense involved and the quality as well as the possible extension of my life in making decisions concerning life-sustaining treatment.

_____ I want my life to be prolonged and I want life-sustaining treatment to be provided or initial continued unless I am in a coma which my attending physician believes to be irreversible, in accordance with reasonable medical standards at the time of reference. If and when I have suffered irreversible coma, I want life-sustaining treatment to be withheld or discontinued.

_____ I want my life to be prolonged to the greatest extent possible without regard to my initial condition, the chances I have for recovery or the cost of the procedures.

(THIS POWER OF ATTORNEY MAY BE AMENDED OR REVOKED BY YOU IN THE MANNER PROVIDED IN SECTION 45/4-6 OF THE ILLINOIS "POWERS OF ATTORNEY FOR HEALTH CARE LAW" (SEE THE BACK OF THIS FORM). ABSENT AMENDMENT OR REVOCATION, THE AUTHORITY GRANTED IN THIS POWER OF ATTORNEY WILL BECOME EFFECTIVE AT THE TIME THIS POWER IS SIGNED AND WILL CONTINUE UNTIL YOUR DEATH, AND BEYOND IF ANATOMICAL GIFT, AUTOPSY OR DISPOSITION OF REMAINS IS AUTHORIZED, UNLESS A LIMITATION ON THE BEGINNING DATE OR DURATION IS MADE BY INITIALING AND COMPLETING EITHER OR BOTH OF THE FOLLOWING:)

3. ( ) This power of attorney shall become effective on _____
(insert a future date or event during your lifetime, such as court determination of your disability, when you want this power to first take effect)

4. ( ) This power of attorney shall terminate on _____
(insert a future date or event during your lifetime, such as court determination of your disability, when you want this power to terminate prior to your death)

(IF YOU WISH TO NAME SUCCESSOR AGENTS, INSERT THE NAMES AND ADDRESSES OF SUCH SUCCESSORS IN THE FOLLOWING PARAGRAPH.)

5. If any agent named by me shall die, become incompetent, resign, refuse to accept the office of agent or be unavailable, I name the following

(each to act alone and successively, in the order named) as successor to such agent: 1st: ALETA C. MORRISS, my daughter, of 9 Lovell Road, Lynnfield, MA 01940; and 2nd: SHERRY L. JACKSON, my daughter, of Dodds-PSC 3-Box 1311, APO AE 09021 .

For purposes of this paragraph 5, a person shall be considered to be incompetent if and while the person is a minor or an adjudicated incompetent or disabled person or the person is unable to give prompt and intelligent consideration to health care matters, as certified by a licensed physician.

(IF YOU WISH TO NAME YOUR AGENT AS GUARDIAN OF YOUR PERSON, IN THE EVENT A COURT DECIDES THAT ONE SHOULD BE APPOINTED, YOU MAY, BUT ARE NOT REQUIRED TO, DO SO BY RETAINING THE FOLLOWING PARAGRAPHS. THE COURT WILL APPOINT YOUR AGENT IF THE COURT FINDS THAT SUCH APPOINTMENT WILL SERVE YOUR BEST INTERESTS AND WELFARE. STRIKE OUT PARAGRAPH 6 IF YOU DO NOT WANT YOUR AGENT TO ACT AS GUARDIAN.)

6. If a guardian of any persons is to be appointed; I nominate the agent acting under this power of attorney as such guardian to serve without bond or security.

7. I am fully informed as to all the contents of this form and understand the full impact of this grant of powers to my agent.

8. This POWER OF ATTORNEY is made by me while I am a resident of the State of Illinois, and I direct that this Power of Attorney shall be interpreted in accordance with Illinois law whether I am a resident or physically located in another state

or foreign jurisdiction at the time of the exercise of the powers granted to the agent hereunder.

1. By being obliterated, burnt, torn or otherwise destroyed or defaced in a manner indicating intention to revoke;

2. By a written revocation of the agency signed and dated by the principal or person acting at the direction of the principal; or

3. By an oral or any other expression of the intent to revoke the agency in the presence of a witness 18 years of age or older who signs and dates a writing confirming that such expression of intent was made.

(b) Every health care agency may be amended at any time by a written amendment signed and dated by the principal or person acting at the direction of the principal.

(c) Any person, other than the agent, to whom a revocation or amendment is communicated or delivered shall make all reasonable efforts to inform the agent of that fact as promptly as possible.

Section 45/4-9. Penalties. All persons shall be subject to the following sanctions in relation to healthcare agencies, in addition to all other sanction applicable under any other law or rule of professional conduct.

(a) Any person shall be civilly liable who, without the principal's consent, willfully consents, cancels or alters a health care agency or any amendment or revocation of the agency or who falsifies or forges a health care agency, amendment or revocation.

(b) A person who falsifies or forges a health

care agency or willfully conceals or withholds personal knowledge of an amendment or revocation of a health care agency with the intent to cause a withholding or withdrawal of life-sustaining or death-delaying procedures contrary to the intent of the principal and thereby, because of such act, directly causes life-sustaining or death-delaying procedures to be withheld or withdrawn and death to the patient to be hastened shall be subject to prosecution for involuntary manslaughter.

(c) Any person who requires or prevents execution of a health care agency as a condition of insuring or providing any type of health care services to the patient shall be civilly labile and guilty of a Class A misdemeanor.

Section 45/4-10. Statutory short form power of attorney for health care.

((a) Paragraph (a) sets out the form of the statutory health care power that is reproduced on the face of this form)

(b) The statutory short form power of attorney for health care (the "statutory heal care power") authorizes the agent to make any and all health care decisions on behalf o the principal which the principal could make if present and under no disability, subject to any limitations on the granted powers that appear on the face of the form, to be exercised in such manner as the agent deems consistent with the intent and desires of the principal. The agent will be under no duty to exercise granted powers or to assume control of or responsibility for the principal's health care, but when granted powers are exercised, the agent will be required to use due care to act for the benefit of the

principal in accordance with the terms of the statutory health care power and will be labile for negligent exercise. The agent may act in person or through others reasonably employed by the agent for that purpose but may not delegate authority to make health care decisions. The agent may sign and deliver all instruments, negotiate and enter into all agreements and do all other acts reasonably necessary to implement the exercise of the powers granted to the agent. Without limiting the generality of the foregoing, the statutory health care power shall include the following powers, subject to any limitations appearing on the face of the form:

(1) The agent is authorized to give consent to and authorize or refuse, or to withhold or withdraw consent to, any and all types of medical care, treatment or procedures relating to the physical or mental health of the principal, including any medication program, surgical procedures, life-sustaining treatment or provision of food and fluids for the principal.

(2) The agent is authorized to admit the principal to or discharge the principal from any and all types of hospitals, institutions, homes, residential or nursing facilities, treatment centers and other health care institutions providing personal care or treatment for any type of physical or mental condition. The agent shall have the same right to visit the principal in the hospital or other institution as is granted to a spouse or adult child of the principal, any rule of the institution to the contrary notwithstanding.

(3) The agent is authorized to contract for any and all types of health care services and

facilities. In the name of and on behalf of the principal and to bind the principal to pay for all such services and facilities, and to have and exercise those powers over the principal's property as are authorized under the statutory property power to the extent the agent deems necessary to pay health care costs; and the agent shall not be personally liable for any services or care contracted for on behalf of the principal.

(4) All the principal's expense and subject to reasonable rules of the health care provider to prevent disruption of the principal's health care, the agent shall have the same right the principal has to examine and copy and consent to disclosure of all the principal's medical records that the agent deems relevant to the exercise of the agent's powers, whether the records relate to mental health or any other medical condition and whether they are in the possession of or maintained by any physician, psychiatrist, psychologist, therapist, hospital, nursing home or other health care provider.

(5) The agent is authorized to direct that an autopsy be made pursuant to Section 2 of "An Act in relation to autopsy of dead bodies", approved August 13, 1965, including all amendments; to make a disposition of any part or all of the principal's body pursuant to the Uniform Anatomical Gift Act, as now or hereafter amended; and to direct the disposition of the principal's remains.

Illinois Power of Attorney Act
Official Statutory Form
765 ILCS 45/4

APPENDIX H

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

VIRGINIA MITCHELL, Executor of the Estate of CHARLES A. MITCHELL,	)	
Plaintiff-Appellee	)	No. 07-L-93
v.	)	
BEVERLY ENTERPRISES – ILLINOIS, INC., d/b/a VIP MANOR	)	
Defendant-Appellant	)	

STATE OF CALIFORNIA	)	
	)ss.	
COUNTY OF FRESNO	)	

AFFIDAVIT OF JULIANNE WILLIAMS-VINK

I, Julianne Williams-Vink, having been first duly sworn, depose and say upon personal knowledge:

1. I am an adult over the age of eighteen years. I submit this affidavit in connection with the

Motion to Compel Arbitration submitted by Defendant Beverly Enterprises-Illinois, Inc.

2. I am the President of Beverly Enterprises-Illinois, Inc.

3. Charles Mitchell was admitted as a resident to VIP Manor on February 2, 2006, and remained at the facility until March 4, 2006.

4. Mr. Mitchell's nursing care at VIP Manor was paid for by the federal Medicare program. Medicare paid $9,355.80 for Mr. Mitchell's nursing care during her admission at VIP Manor. VIP Manor's requests for Medicare payments for services rendered to Mr. Mitchell went to United Government Services, located in the State of California, and Medicare payments were processed by a BEI bank account located in the State of New York.

5. In 20065, the Medicare program paid $966,858.00 for 3,883 patient days of nursing care provided to various residents at VIP Manor. In 2006, the Illinois Medicaid Program aid $1,819,355.00 for care to residents at VIP Manor. The Illinois Medicaid Program is partially funded by the federal government.

6. Linens, laundry, and maintenance to the facility are provided by Healthcare Services Group, located in Pennsylvania. Various equipment and supplies are provided by companies situated in Wisconsin, Georgia, Texas, California, Pennsylvania, Minnesota, and Missouri. Companies located in Colorado and Ohio supply videos and magazines for the residents' use at the facility. Companies located in Missouri, Biological Technology Lab Inc., Gamma Healthcare Inc., and biotech X-Ray Inc., provide lab and x-ray services for residents at the facility.

7. Recruiting for the facility staff occurs through HotJobs.com, located in New Jersey, and Jobs in LTC Inc., located in South Carolina. The facility's staff periodically travels from Illinois to Texas to receive computer training. Marketing and advertising of the facility is conducted by Retzke & Associates Inc., located in Wisconsin, and Gustin Advertising, located in Massachusetts. Financial services are provided by AVAYA Financial Services, located in New Jersey. Delivery services are provided by Federal Express Corp., located in Pennsylvania.

s/Julianne Williams-Vink
Julianne Williams-Vink

Subscribed and sworn to before me this 14th day of June 2007.

By: Julianne Williams-Vink
~~Personally known to me or~~ proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me, Linda Neelen, Notary Public. s/L.N.

s/Linda Neelen
Notary Public

Linda Neelen
Comm. #1682627
Notary Public-
California
Fresno County
My Comm. Expires
July 20, 2010

APPENDIX I

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

MARTHA BLAZIER, Executor of the Estate of CHARLES A. MITCHELL,	)	
Plaintiff,	)	**FILED Jan 30 2007 PM 2:37 Clerk of Circuit Court #7 Third Judicial Circuit Madison County, Illinois**
v.	)	
BEVERLY ENTERPRISES – ILLINOIS, INC., d/b/a VIP MANOR and THOMAS B. SELDERS,	)	
Defendants.	)	07-L-93

COMPLAINT

COUNT I

COMES NOW the plaintiff, VIRGINIA MITCHELL, Executor of the Estate of CHARLES A. MITCHELL, by her attorney, the Law Office of Robert H. Gregory, P.C., and complaining of the defendant, BEVERLY ENTERPRISES - ILLINOIS, INC., d/b/a VIP MANOR, states:

1. Plaintiff brings this cause of action pursuant to Chapter 210 ILCS 45/3-601 and 602.

2. Charles A. Mitchell was a resident of VIP Manor, Wood River, Madison County, Illinois at all times relevant hereto.

3. Virginia Mitchell is the duly appointed executor of the Estate of Charles A. Mitchell, as evidenced by the Letters of Office attached hereto as Exhibit A and as such is authorized to bring this suit on behalf of the Estate.

4. On March 4, 2006, Charles A. Mitchell was admitted to Alton Memorial Hospital with diagnoses in relevant part of narcotic overdose and aspiration pneumonia.

5. That the defendant, by and through its employees, agents and servants acting within the scope of their employment, then and there owed a duty to Charles A. Mitchell to exercise ordinary care so as not to cause him injury, but that in spite of said duty, the defendant, by and through its agents, servants and employees, was then and there guilty of one or more of the following negligent acts or omissions:

a) failed to properly notify and consult with decedent's treating physician regarding a significant deterioration in the decedent's physical, mental and/or psychosocial status and of decedent's fall and the injuries sustained by decedent, in violation of 42 CFR Ch. IV §483.10(b)(11)(A)(B);

b) failed to properly notify decedent's next of kin regarding a significant deterioration in the decedent's physical, mental and/or psychosocial status and of decedent's fall and the injuries

sustained by decedent, in violation of 42 CFR Ch. IV §483.10(b)(11)(A)(B);

c) failed to properly notify and consult with decedent's treating physician regarding the need to discontinue the existing form of treatment rendered to decedent and/or to commence a new form of treatment for decedent, in violation of 42 CFR Ch. IV §483.10(b)(11)(C);

d) negligently failed to care for the decedent in a manner which maintained and enhanced the decedent's dignity and quality of life, in violation of 42 CFR Ch. IV §483.15(a);

e) negligently failed to employ sufficient staff to provide adequate medical or personal care to decedent which resulted in the deterioration of decedent's physical or mental condition and his injuries, in violation of 77 Ill. Adm. Code §§300.810, 300.1230

f) failed to timely report the abuse and/or neglect and/or injury of the decedent to the Department of Public Health of the State of Illinois, in violation of 77 Ill. Adm. Code §300.690(a);

g) Failed to provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial wellbeing of the decedent, in violation of 77 Ill. Adm. Code §300.1210(a); and

h) negligently violated its own resident care policies by failing to provide necessary care and services to the decedent, in violation of 77 Ill. Adm. Code §300.610(a).

6. That one or more of the foregoing negligent acts or omissions proximately caused the injury and death of Charles A. Mitchell as hereinafter alleged.

7. Such conduct on the part of defendant's agents, servants, or employees violates the Nursing Home Care Act.

8. That three fentanyl patches were placed upon Charles A. Mitchell by defendant's agents, servants or employees while Mr. Mitchell was a resident of defendant's long-term care facility, resulting in narcotic overdose and aspiration pneumonia. Consequently, he suffered a marked deterioration of his prior physical condition and he thereafter died of those injuries on March 12, 2006. By reason of his injuries, the Estate of Charles A. Mitchell became liable for large sums of money for nursing care and attention, physician, hospital and other bills in and about endeavoring to become healed and cured of his injuries. He suffered great pain and anguish as a result of said injuries, all to his damage in a sum in excess of FIFTY THOUSAND DOLLARS ($50,000.00).

9. Plaintiff, as Executor of the Estate of Charles A. Mitchell, seeks herein all damages to which the Estate may be entitled under the Illinois Nursing Home Care Act (210 ILCS 45/3-601, et seq.), and the Illinois Wrongful Death Act (740 ILCS 180/1, et seq.).

WHEREFORE, plaintiff, VIRGINIA MITCHELL, as Executor of the Estate of CHARLES A. MITCHELL, demands judgment against defendant, BEVERLY ENTERPRISES - ILLINOIS, INC., d/b/a VIP MANOR, for a sum in excess of FIFTY THOUSAND DOLLARS ($50,000.00), for costs of suit, and for such other and further relief as the court deems just.

COUNT II

COMES NOW the plaintiff, VIRGINIA MITCHELL, Executor of the Estate of CHARLES A. MITCHELL, by her attorney, the Law Office of Robert H. Gregory, P.C., and complaining of the defendant, THOMAS B. SELDERS:

1. Plaintiff brings this cause of action pursuant to Chapter 210 ILCS 45/3-601 and 602.

2. Charles A. Mitchell was a resident of VIP Manor, Wood River, Madison County, Illinois at all times relevant hereto.

3. Defendant, upon information and belief, is a resident of Collinsville, Madison County, Illinois.

4. Virginia Mitchell is the duly appointed executor of the Estate of Charles A. Mitchell, as evidenced by the Letters of Office attached hereto as Exhibit A and as such is authorized to bring this suit on behalf of the Estate.

5. On March 4, 2006, Charles A. Mitchell was admitted to Alton Memorial Hospital with diagnoses in relevant part of narcotic overdose and aspiration pneumonia.

6. That the defendant, as the Administrator of the defendant's long-term care facility, was

charged with the general administration and supervision of defendant's facility, and as such, then and there owed a duty to the decedent to exercise ordinary care so as not to cause him injury, but that in spite of said duty, the defendant was guilty of one or more of the following negligent acts or omissions.

a) failed to properly notify and consult with decedent's treating physician regarding a significant deterioration in the decedent's physical, mental and/or psychosocial status and of decedent's fall and the injuries sustained by decedent, in violation of 42 CFR Ch. IV §483.10(b)(11)(A)(B);

b) failed to properly notify decedent's next of kin regarding a significant deterioration in the decedent's physical, mental and/or psychosocial status and of decedent's fall and the injuries sustained by decedent, in violation of 42 CFR Ch. IV §483.10(b)(11)(A)(B);

c) failed to properly notify and consult with decedent's treating physician regarding the need to discontinue the existing form of treatment rendered to decedent and/or to commence a new form of treatment for decedent, in violation of 42 CFR Ch. IV §483.10(b)(11)(C);

d) negligently failed to care for the decedent in a manner which maintained and enhanced the decedent's dignity and quality of life, in violation of 42 CFR Ch. IV §483.15(a);

e) negligently failed to employ sufficient staff to provide adequate medical or personal care to decedent which resulted in the deterioration of decedent's physical or mental condition and his injuries, in violation of 77 Ill. Adm. Code §§300.810, 300.1230

f) failed to timely report the abuse and/or neglect and/or injury of the decedent to the Department of Public Health of the State of Illinois, in violation of 77 Ill. Adm. Code §300.690(a);

g) failed to provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial wellbeing of the decedent, in violation of 77 Ill. Adm. Code §300.1210(a); and

h) negligently violated its own resident care policies by failing to provide necessary care and services to the decedent, in violation of 77 Ill. Adm. Code §300.610(a).

7. That one or more of the foregoing negligent acts or omissions proximately caused the injury and death of Charles A. Mitchell as hereinafter alleged.

8. Such conduct on the part of defendant's agents, servants, or employees violates the Nursing Home Care Act.

9. That three fentanyl patches were placed upon Charles A. Mitchell by defendant's agents, servants or employees while Mr. Mitchell was a

resident of defendant's long-term care facility, resulting in narcotic overdose and aspiration pneumonia. Consequently, he suffered a marked deterioration of his prior physical condition and he thereafter died of those injuries on March 12, 2006. By reason of his injuries, the Estate of Charles A. Mitchell became liable for large sums of money for nursing care and attention, physician, hospital and other bills in and about endeavoring to become healed and cured of his injuries. He suffered great pain and anguish as a result of said injuries, all to his damage in a sum in excess of FIFTY THOUSAND DOLLARS ($50,000.00).

10. Plaintiff, as Executor of the Estate of Charles A. Mitchell, seeks herein all damages to which the Estate may be entitled under the Illinois Nursing Home Care Act (210 ILCS 45/3-601, et seq.), and the Illinois Wrongful Death Act (740 ILCS]80/1, et seq.).

WHEREFORE, plaintiff, VIRGINIA MITCHELL, as Executor of the Estate of CHARLES A. MITCHELL, demands judgment against defendant, BEVERLY ENTERPRISES - ILLINOIS, INC., d/b/a VIP MANOR, for a sum in excess of FIFTY THOUSAND DOLLARS ($50,000.00), for costs of suit, and for such other and further relief as the court deems just.

Respectfully submitted,

LAW OFFICE OF ROBERT H. GREGORY, P.C.

s/Robert H. Gregory

Robert H. Gregory IL# 03122358
Attorney for Plaintiff
970 E. Airline Drive, Suite 3
East Alton, IL 62024
PH: 618-258-7226
FAX: 618-258-7430